Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

CRAIG A. CUNNINGHAM,
*Petitioner*,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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August 21, 2006

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## QUESTION PRESENTED

Whether a settlement agreement and release executed by Petitioner with the United States, which was signed by the United States Attorneys' Office as "UNITED STATES (on behalf of itself, its officers, agents, agencies, and departments)," binds the United States Securities and Exchange Commission in a subsequent action for disgorgement.

## PARTIES TO THE PROCEEDINGS

*Petitioner* is Craig A. Cunningham.

*Respondent* is the U.S. Securities and Exchange Commission.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Craig A. Cunningham ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed on April 14, 2006.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported as *SEC v. Currency Trading Int'l, Inc.*, 2006 U.S. App. LEXIS 9527 (9th Cir. 2006) and is reproduced in the Appendix at App. A at 1a.

The opinion of the United States District Court for the Central District of California, dated April 28, 2004, is reproduced at App. B at 5a.

## JURISDICTION

The court of appeals judgment was entered on April 14, 2006. This Petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed prior to August 21, 2006, the expiration of the extension of time graciously provided by this Court. This Court has jurisdiction to review the order of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1254.

## STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 28 U.S.C. §§ 516, 519, 547(2), and 18 U.S.C. § 1345, are reproduced at App. D at 41a.

## STATEMENT OF THE CASE

Petitioner seeks review of the ruling of the Ninth Circuit Court of Appeals holding that a disgorgement action brought by the United States Securities and Exchange Commission ("SEC") in 2000 could proceed notwithstanding a 1998 settlement agreement with the Department of Justice ("DOJ"), executed on behalf of the United States and its agencies, purporting to release all claims of forfeiture.

Petitioner seeks review of the Ninth Circuit's ruling because it is in conflict with the rulings of several other circuits that consider an agreement executed by an office of the United States Attorney to bind the Government at large. It is also in conflict with the rulings of this Court and federal law concerning both contract interpretation and civil procedure.

The Petition arises out of an enforcement action brought by the SEC in the U.S. District Court for the Central District of California (the "District Court") in January 2000. The SEC complaint alleged that the defendants, including Petitioner, who was a 50 percent owner and vice president of defendant Currency Trading International, Inc. ("CTI"), violated federal securities laws by offering and selling foreign currency options to the public through CTI. The SEC complaint sought an injunction, penalties, and disgorgement.

Petitioner asserted that the disgorgement claim was barred by a settlement and release agreement executed by Petitioner and the DOJ on November 30, 1998, which had been approved and implemented by two Court Orders entered by the U.S. District Court for the Northern District of Ohio (the settlement agreement and effectuating orders are hereinafter referred to collectively as the "DOJ Settlement").

The DOJ Settlement provides, in relevant part,

"RELEASES AND PROMISES NOT TO ASSERT CLAIMS

...the UNITED STATES (on behalf of itself, its officers, agents, **agencies**, and departments):

(a) agrees to and hereby releases the Defendants from any and all claims the UNITED STATES has or may have **under Title 18, § 1345**, United States Code, arising from the FEDERAL CIVIL ACTION, and

(b) **agrees not to bring any claim seeking civil or criminal forfeiture of assets of the Defendants or CTI** or to seize any such assets in anticipation of civil or criminal forfeiture, based on conduct involving the sale or brokering of third party investments in foreign currency options by ... CTI as the offense conduct or 'specified unlawful activity' giving rise to the government's entitlement to forfeiture, and hereby releases the Defendants and CTI from any and all such claims.

EXCEPTIONS AND RESERVATIONS

This Agreement does not determine, settle, or resolve claims, if any, under Title 26, United States Code (Internal Revenue Code) or regulations thereunder. This Agreement does not determine, settle, or resolve any interpretation of the tax liabilities arising from the payments made by the Parties, or any interpretation of the Internal Revenue Code or regulations thereunder.

> Nothing in this Agreement would prevent any government agency from taking action to obtain funds of the Defendants or CTI to pay **restitution**, fines, and penalties (**other than forfeiture or seizure in anticipation of forfeiture**) with respect to the conduct of the operations of ... CTI, as well as any other conduct...
>
> REPRESENTATIONS, WARRANTIES, AND MISCELLANEOUS PROVISIONS
>
> Each of the officers or agents executing this Agreement on behalf of his/its respective person, corporation, or other entity, as the case may be, is empowered to do so and thereby binds his/its respective person, corporation or other entity.
>
> ...This Agreement is governed by the laws of the United States. The Parties agree that the **exclusive jurisdiction** and venue for any dispute arising between and among the Parties under this Agreement **will be the United States District Court for the Northern District of Ohio**.
>
> This Agreement constitutes the complete agreement between the Parties with respect to the subject matter hereto. This Agreement is binding upon and shall inure to the benefit of the Parties hereto. This Agreement may be amended only by an agreement in writing signed by all of the Parties." [Emphasis added.]

Petitioner claimed that, because the Assistant United States Attorney signed the DOJ Settlement on behalf of the "United

States, its officers, agents, agencies and departments," the DOJ Settlement bound the SEC.

The DOJ's authority to settle on b[illegible]alf of the SEC was further evidenced by the SEC's participation in the joint task force, which led to the allegations that were the subject of the DOJ Settlement. The negotiations took place contemporaneously with the organized task force investigation of the business practices of CTI and its principals, and the SEC was a member of the task force as was the Commodity Futures Trading Commission and the U.S. Attorneys' Office. The SEC also took place in weekly telephonic roundtable led by the U.S. Attorneys' Office. Based upon its extensive involvement, Petitioner argued that the SEC had actual knowledge of the DOJ Settlement and had a duty to object prior to its execution.

Petitioner also maintained that given the fact that the DOJ Settlement carved out an exception for claims which may be brought pursuant to the Internal Revenue Code, such a provision underscored the proposition that had the SEC intervened prior to execution, it could have lobbied for a similar exclusion.

Alternatively, Petitioner argued that, to the extent the SEC desired to modify the DOJ Settlement *ex post facto*, it was required to raise that issue in the Northern District of Ohio.

Petitioner further asserted that the SEC action contravened the terms of the DOJ Settlement because the DOJ Settlement established the CTI Restoration Fund, which was funded in part by $6,362,237.49 previously seized from Petitioner, and was specifically intended,

> "to pay claims made by CTI customers and/**or any federal government agency** seeking compensation on behalf of CTI customers arising from breach of contract or wrongdoing of any kind with respect to CTI's activities of brokering sales and purchases and/or trading foreign currency options..." [Emphasis added.]

With respect to the CTI Restoration Fund, the DOJ Settlement further provides,

> "Beginning at such time as a GOVERNMENT CLAIM AGAINST CTI is made, as defined above, the FUND will be used to pay that claim and any other pending or subsequent timely-filed claim(s)..."

The DOJ Settlement defines a "GOVERNMENT CLAIM AGAINST CTI" to be "A CLAIM AGAINST CTI made by the UNITED STATES or any agency thereof."

In January 2001, in a filing with the U.S. District Court for the Northern District of Ohio, the Assistant United States Attorney ("AUSA") who drafted the DOJ Settlement stated that the SEC complaint constituted "a 'GOVERNMENT CLAIM AGAINST CTI,' as defined in the [DOJ Settlement]."

Based upon the foregoing, on August 23, 2002, Petitioner filed a Motion for Summary Judgment as to the disgorgement portion of the SEC complaint.

On October 21, 2003, the District Court denied Petitioner's Motion for Summary Judgment. The District Court appeared to have determined that the agreement applied, but that the SEC could not be bound by the DOJ

Settlement. Citing *Federal Crop Ins. v. Merrill*, 332 U.S. 380, 384 (1947), the District Court found "no express or implied authority on the part of the U.S. Attorneys Office to bind the SEC to the Ohio settlement agreement..." Notwithstanding the fact that the restitution exception contained in the DOJ Settlement was limited to claims "other than forfeiture," the District Court further held that the SEC claim for disgorgement was "akin to restitution of unjust enrichment" and thus was not released by the DOJ Settlement.

On May 3, 2004, the District Court entered its Final Judgment. In addition to an injunction and penalties, the District Court found Petitioner liable for disgorgement of $4,361,922.50 plus pre-judgment interest.

Petitioner appealed the decision of the District Court to the Ninth Circuit Court of Appeals. Petitioner argued that the District Court's decision ignored the DOJ's plenary power, under 28 U.S.C. §§ 516, 519, and 547(2), to conduct and settle civil litigation concerning the United States.

Relying on this Court's decision in *United States v. Usery*, 518 U.S. 267 (1996), Petitioner further claimed that the District Court erred in concluding that disgorgement was "akin to restitution" because such an interpretation misconstrues the ordinary meaning of those terms.

Petitioner also maintained that the District Court improperly determined that the DOJ Settlement could not bind the SEC because it disregarded the fact that, pursuant to the terms of the DOJ Settlement, jurisdiction for any dispute arising between the parties was only proper before the Northern District of Ohio.

On April 14, 2006, the Ninth Circuit affirmed the decision of the District Court. In so doing, the Ninth Circuit effectively rewrote the DOJ Settlement and the court orders implementing the same. It did so by ascribing a highly technical definition to "forfeiture," an otherwise unambiguous term, and thus avoided addressing the central issue, to wit, whether the SEC was bound by the DOJ Settlement.

Notwithstanding the fact that the DOJ Settlement was devoid of any reference to claims arising under 18 U.S.C. §§ 981 and 982, the Ninth Circuit held that "'[c]ivil forfeiture' and 'criminal forfeiture' are terms of art that ... refer specifically to actions under 18 U.S.C. §§ 981 and 982..." such that the DOJ Settlement did not affect the SEC's right to bring a disgorgement action under Title 15 of the United States Code.

## REASONS FOR GRANTING THE PETITION

### A. The Court of Appeals' Decision Undermines this Court's Decision in *United States v. Usery* and Others

This Court has held that a "cardinal principle of contract construction" requires that a contract be read "to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 63 (1995). The DOJ Settlement represented that the AUSA had express actual authority to bind the United States and its agencies. The DOJ Settlement stated that the United States and its agencies agreed to release all claims of forfeiture under Title 18, Section 1345. The next paragraph, which was not so limited, provided that the United States and its agencies agreed not to bring any claims seeking criminal or civil forfeiture based on conduct involving the specified unlawful activity giving rise to the Government's entitlement

to forfeiture.[1] And while there was an exception that allowed Government agencies to seek restitution,[2] that provision was qualified by the phrase "other than forfeiture or seizure in anticipation of forfeiture." All other claims (i.e., disgorgement) made by "any federal government agency" were to be paid from the CTI Restoration Fund.

This Court has reasoned that the term forfeiture encompasses disgorgement. *Usery*, *supra*, 518 U.S. at 284 (forfeitures are designed primarily to confiscate property and to obtain disgorgement).[3] Given that the DOJ Settlement expressly provided that it was to be governed by the laws of the United States, the Ninth Circuit could not disregard the authority of this Court directly on point. The DOJ Settlement, interpreted as a whole and with its terms defined

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[1] The Ninth Circuit held that the term "civil forfeiture," as used in the DOJ Settlement, "refer[s] specifically to actions under 18 U.S.C. §§ 981 and 982." It is well settled, however, that a court should construe ambiguous language against the interest of the party that drafted it. *Mastrobuono*, *supra*, 514 U.S. at 62. It is further undisputed that the drafting party was the United States as represented by the AUSA. While the DOJ Settlement specifically references 18 U.S.C. § 1345, it fails to make any mention of 18 U.S.C. §§ 881 and/or 982. Consequently, there was no basis for the Ninth Circuit's interpretation in this regard.

[2] It is also important to note that, not only does the express language of the DOJ Settlement limit the remedy of restitution to claims other than forfeiture (a term which encompasses disgorgement), the SEC complaint made no reference whatsoever to a claim for restitution. The remedies sought by the SEC were limited an injunction, disgorgement and civil penalties.

[3] Indeed, the SEC's own trial expert, Norman Poser, testified that forfeiture as a remedy is "broader" that disgorgement.

by their ordinary meaning, clearly precluded the SEC's disgorgement action.[4]

Even if the terms of the DOJ Settlement, including those set forth in the implementing court orders, were ambiguous, the lower courts erred in allowing the SEC to seek clarification of the same through an action filed in the Central District of California. This Court has held that a party seeking to amend a court order must do so with the issuing court and not elsewhere. *United States v. United Mine Workers of America*, 330 U.S. 258 (1947). The SEC was, therefore, required to raise its concerns in the Northern District of Ohio. This requirement is underscored by the SEC's actual knowledge of the DOJ Settlement, its participation in the task force leading to the allegations contained therein, and the fact that it stood silent while the DOJ purported to settle all such claims on behalf of the United States and its agencies.

The Ninth Circuit's decision, insofar as it allowed the SEC to modify the DOJ Settlement, which necessarily included rewriting the court orders implementing the same, effectively permitted the SEC make an end-run around the issuing court. For this reason alone, the granting of this Petition is warranted.

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[4] It is also worth noting that while the parties to the DOJ Settlement expressly agreed not to release any claims that may be brought pursuant to the Internal Revenue Code, there was no reference whatsoever to potential claims brought by the SEC. This omission further supports Petitioner's position that, taken as a whole, the DOJ Settlement intended to release such claims.

**B. The Circuits are Split**

More importantly, this case presents important issues of federal law on which the circuits are split. The Ninth Circuit's decision, which renders superfluous essential and unambiguous terms of the DOJ Settlement, is not only contrary to federal law governing contract interpretation, it limits the express authority of the DOJ to settle litigation in which it has an interest. Title 28 U.S.C. §§ 516 and 519 authorize the Attorney General to supervise all litigation involving an agency of the Government unless the law otherwise directs. As an incident to this broad grant, the DOJ has authority to agree to dismissal of actions brought by the Government. *See Confiscation Cases*, 74 U.S. (7 Wall) 454, 458, 19 L. Ed. 196 (1868). Whether such authority permits the DOJ to settle all claims among all agencies is unresolved.

Cases involving governmental agents' authority to bind other agencies, generally speaking, fall into one of two distinct categories: 1) those involving prosecutorial discretion and/or misconduct; and 2) those grounded in contract principles of estoppel. With respect to the former, the Ninth Circuit's attempt to avoid this issue highlights a direct conflict with the decisions of at least three other circuits that have sought to preserve the integrity of agents who negotiate on behalf of the Government.

In *United States v. Flemmi*, 225 F.3d 78 (1st Cir. 2000), the First Circuit stated that "a government agent possesses express authority to bind the government if ... the Constitution, a federal statute, or a duly promulgated regulation grants such authority in clear and unequivocal terms." At the same time, *Flemmi* recognized the lack of consistency in this regard by stating, "how the rule operates in practice is far less cut and dried." *Id.* at 85. In *Margalli-*

*Olvera v. Immigration and Naturalization Service*, 43 F.3d 345 (8th Cir. 1994), the Eighth Circuit upheld the authority of an AUSA to bind the INS to a plea agreement and stated that a United States Attorney has authority to bind all governmental agencies. In *United States v. Harvey*, 791 F.2d 294 (4th Cir. 1986), the Fourth Circuit reasoned that when the Government negotiates through an agency of specific U.S. Attorneys, the agreements reached are those of the Government at large. *See also, Exec. Business Media v. United States Dep't of Def.*, 3 F.3d 759, 762 (4th Cir. 1993) (holding that "when the Attorney General represents an agency in litigation, it is the Attorney General, rather than the agency, who has the final authority to determine the litigation position of the United States"). The Fifth Circuit has similarly held that the Attorney General has plenary power and supervision over all government litigation, including litigation involving regulatory agencies, pursuant to 28 U.S.C. §§ 516 and 519. *See Interstate Commerce Com. v. Southern R. Co.*, 543 F.2d 534 (5th Cir. 1976).

The Seventh and Eleventh Circuits, on the other hand, have concluded that U.S. Attorneys lack authority to make agreements that bind other agencies. In *United States v. Rourke*, 74 F.3d 802 (7th Cir 1996), *cert. denied*, 116 S. Ct. 1840 (1996), the Seventh Circuit held that the FAA could not be bound by an agreement made without its approval. And while in *United States v. Kettering*, 861 F.2d 675 (11th Cir. 1988), the Eleventh Circuit stated that, "government agents should exercise great care in making certain that defendants are apprised of limitations in authority," with respect to the authority of U.S. Attorneys to bind other branches of the federal government, the Eleventh Circuit has responded in a fashion similar to the Seventh Circuit, and contrary to the authority of the First, Fourth, Fifth, and Eighth Circuits. *See e.g., San Pedro v. United States*, 79 F.3d 1065 (11th Cir.

1996), *cert. denied*, 117 S. Ct. 431 (1996) (holding that the U.S. Attorney's general powers of prosecution could not usurp the specific powers of the INS and the U.S. Attorney General to control deportation proceedings).

Prior to its instant ruling, the Ninth Circuit had pursued a middle ground in which only U.S. Attorneys have the unique authority to bind other branches of the Government. *Thomas v. Immigration and Naturalization Service*, 35 F.3d 1332 (9th Cir. 1993) reasoned that, under ordinary principles of agency law, the U.S. Attorneys have the authority to make agreements that are binding on other government agencies because authority to prosecute for all offenses against the United States implies such authority.[5]

A similar spilt of authority is apparent when examining an agent's authority under contract principles of estoppel. In denying Petitioner's motion for summary judgment, the trial court cited to *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947) for the proposition that "[w]hatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." While *Merrill* undoubtedly stands for a restrictive notion of the applicability of the estoppel defense against the Government, the doctrine has undergone considerable development since.

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[5] While the SEC went to great lengths to distinguish the instant case from *Thomas*, it was only able to do so by adopting a self-serving interpretation of what it means to be an "independent agency." Nevertheless, independent litigating authority does not, in and of itself, permit the SEC to disregard an otherwise valid agreement executed by the DOJ. At a minimum, such justification further demonstrates a lack of clear precedent in this regard.

Indeed, this Court has stated, "when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." *Heckler v. Community Health Servs.*, 467 U.S. 51, 61 (U.S. 1984) citing, *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 670-675 (1973); *Moser* v. *United States*, 341 U.S. 41 (1951). This Court has also acknowledged that there may be cases in which all of the traditional elements of estoppel are met and "the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government." *Id.*

All of the traditional elements of an estoppel (false representation, a purpose to invite action by the party to whom the representation was made, ignorance of the true facts by that party, and reliance) are present here. The DOJ clearly knew that the SEC was conducting its own investigation that may have led to an action for disgorgement notwithstanding the DOJ Settlement. The DOJ had every reason to believe Petitioner would nevertheless rely on its statement that the United States and its agencies would release all claims of forfeiture upon execution of the DOJ Settlement. At the time, Petitioner was ignorant of the Government's current position and took the Government at its word. Petitioner relied, not only on the manifestations of the DOJ insofar as it purported to bind the United States and its agencies, but also on the fact that such authorization was clearly and specifically delineated in 28 U.S.C. §§ 516, 519, and 547(2). Thus, there exist affirmatively misleading statements, actual express authority, and reliance giving rise to estoppel.

Moreover, the interest of citizens, insofar at it relates to the credibility of the Government as manifested in its ability to dispose of litigation by way of settlement, substantially outweighs any concerns regarding application of the estoppel doctrine in this case. Concerns over protection of the public fisc and unauthorized depredations of the Treasury are not at issue, as Petitioner is not seeking a government benefit or monetary relief contrary to statute. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 429-433 (1990). Nor is this a situation where there is a risk of collusion between an unauthorized agent of the Government and Petitioner. *Lee v. Munroe & Thornton*, 11 U.S. (7 Cranch) 366, 370 (1813). Rather, the sole issue presented by this case is whether Petitioner should be afforded relief from an infirmed governmental action to which it had no right to in the first place.

The need for clarity in this regard is reinforced by the fact that, since *Merrill*, the lower courts have applied estoppel against the Government with increasing frequency, but without uniformity. This application has resulted in confusion and conflict among the circuits about the proper standard. The Eighth, Ninth and Tenth Circuits have authorized estopping the Government when a litigant proves the traditional elements of estoppel and some "affirmative misconduct" by the Government. *See, e.g., Leimbach v. Califano*, 596 F.2d 300, 305 (8th Cir. 1979); *Watkins v. United States Army*, 875 F.2d 699, 707 (9th Cir. 1989); *Lurch v. United States*, 719 F.2d 333, 341 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 1710 (1984).

Others circuits support the notion of holding the Government liable for the actions of its agents taken within the scope of their official duties as objectively determined. *See, e.g., H. Landau & Co. v. United States*, 886 F.2d 322

(Fed. Cir. 1989) (finding authority to bind the government implied when such authority is considered to be an integral part of the duties assigned to a government employee); *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998) (holding that government agents have the requisite authorization if they act within the general scope of their duties, i.e., if their actions are a "natural consequence of Congressionally approved measures").

The Fifth and Eleventh Circuits have applied estoppel against the Government when the conduct of the agent involved is in the performance of a proprietary function as distinguished from a governmental function. *See, e.g., Hicks v. Harris*, 606 F.2d 65 (5th Cir. 1979); *Buccaneer Point Estates, Inc. v. United States*, 729 F.2d 1297 (11th Cir. 1984). *See also, Deltona Corp. v. Alexander*, 682 F.2d 888, 891-92 (11th Cir. 1982) (barring application of estoppel where Government acted in its sovereign capacity, but suggesting that, in the Fifth Circuit, Government might be estopped when acting in a proprietary manner).

In short, the decision of the Ninth Circuit Court of Appeals highlights a fundamental split among the circuits. Petitioner argues that the public has an interest in seeing its Government deal carefully, honestly and fairly with its citizens and honor its settlement contracts. Whether relief is afforded based upon traditional agency theory or contract principles of estoppel, Petitioner merely seeks to have the Government honor its contractual promise that the DOJ was specifically authorized to have made. Absent a clear policy in this regard, such confusion is likely to continue. Review and reversal of the Ninth Circuit's decision is, therefore, warranted.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**No. 04-56038**

**[Filed April 14, 2006]**

| | |
|---|---|
| SECURITIES AND EXCHANGE COMMISSION, Plaintiff - Appellee, | ) |
| v. | ) |
| CURRENCY TRADING INTERNATIONAL, INC., et al., Defendants, | ) |
| and | ) |
| CRAIG A. CUNNINGHAM, Defendant - Appellant. | ) |

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-02-05143-PA
Percy Anderson, District Judge, Presiding

Before: GRABER, WARDLAW, and RAWLINSON, Circuit Judges.

**MEMORANDUM***

Defendant Craig A. Cunningham appeals from a decision of the district court, ordering him to disgorge more than $4.3 million on account of securities fraud perpetrated through a company called Currency Trading International, Inc. ("CTI"). Defendant argues that his 1998 settlement agreement with the Department of Justice bars the Security and Exchange Commission's ("SEC") later disgorgement claim or, in the alternative, that he is entitled to offset payments under that agreement against the disgorgement amount.

(1) On de novo review, *Congregation Etz Chaim v. City of Los Angeles*, 371 F.3d 1122, 1124 (9th Cir. 2004), we hold that the district court did not err by concluding that the disgorgement action could proceed notwithstanding the 1998 settlement agreement. The settlement agreement provides that the United States will refrain from bringing any claim for "civil or criminal forfeiture" against Defendant. "Civil forfeiture" and "criminal forfeiture" are terms of art that, in this agreement, refer specifically to actions under 18 U.S.C. §§ 981 and 982; the wording in the settlement agreement closely tracks the wording of those statutes. Additionally, the agreement expressly preserves the right of "any . . . government agency" to file claims and says that nothing in the agreement "shall be construed as a limitation against any civil or administrative claims other than the claims

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

expressly released." Accordingly, the 1998 settlement agreement does not affect the SEC's right to bring a disgorgement action under Title 15 of the United States Code.

(2) We review for abuse of discretion the district court's calculation of disgorgement. *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1190 (9th Cir. 1998). Although Defendant previously provided restitution to some of CTI's defrauded investors pursuant to the 1998 settlement agreement, the district court still could require him to disgorge all of his ill-gotten gains. *See SEC v. J.T. Wallenbrock & Assocs.*, 440 F.3d 1109 (9th Cir. 2006) (in an SEC case, upholding a district court's order requiring the defendant to disgorge the entire amount by which he and his co-defendants were unjustly enriched, even though he also had been ordered to pay more than $145 million in restitution to his victims as part of a separate criminal action). Disgorgement is designed not only to deprive a wrongdoer of unjust enrichment, but also to deter others from violating securities laws by making violations unprofitable. *Id.* at 1113.

In view of these principles, we find no abuse of discretion in the district court's denial of Defendant's request to order an offset now. We note, however, the SEC's concession that Defendant will "be entitled to an offset to the extent that the amount of his illegally obtained gains was reduced by the use of the seized funds to reimburse investors whose transactions were the basis of the disgorgement award" and that, when the SEC collects the disgorgement, Defendant will "be allowed a set off at that time for any of the funds seized from him to the extent they are, in fact, used to reimburse investors whose transactions were the basis of the disgorgement award (or to pay the costs of administration)." The government is bound by that written concession and must offset the described amounts, if and when the conditions are met.

AFFIRMED.

RAWLINSON, Circuit Judge, concurring:

I concur in the result.

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**
**WESTERN DIVISION**

**No. CV 02-05143 PA (Ctx)**

**[Filed April 28, 2004]**

| | |
|---|---|
| SECURITIES AND EXCHANGE COMMISSION, Plaintiff, | ) |
| v. | ) |
| CURRENCY TRADING INTERNATIONAL, INC., BRIAN R. MOORE, CRAIG A. CUNNINGHAM, CRAIG WIGINTON, JAMES R. KELSALL, CHRISTIAN J. WEBER and ROBERT SHANE JONES, Defendants. | ) |

**REVISED FINAL JUDGMENT OF PERMANENT INJUNCTION, DISGORGEMENT, PREJUDGMENT INTEREST, AND CIVIL PENALTIES AGAINST DEFENDANTS CURRENCY TRADING INTERNATIONAL, INC., BRIAN R. MOORE, CRAIG A. CUNNINGHAM, JAMES R. KELSALL, AND CHRISTIAN J. WEBER**

The above-entitled securities fraud action was filed by Plaintiff Securities and Exchange Commission ("Commission") against various individuals and entities involved in selling foreign currency options. The remaining defendants in the Commission's action are Currency Trading International, Inc. ("CTI"), Brian R. Moore ("Moore"), Craig A. Cunningham ("Cunningham"), James R. Kelsall ("Kelsall"), and Christian J. Weber ("Weber") (collectively "defendants"). Following trial against these defendants, the parties submitted proposed findings of fact and conclusions of law. Having considered the evidence, briefs, and arguments of the parties, having entered findings of fact and conclusions of law on February 5, 2004, pursuant to Rule 52 of the Federal Rules of Civil Procedure, and having found in favor of the Commission and against Defendants CTI, Moore, Cunningham, Kelsall, and Weber, the Court now enters this Final Judgment of Permanent Injunction, Disgorgement, Prejudgment Interest, and Civil Penalties ("Final Judgment") against each of the defendants.

I.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants CTI, Moore, Cunningham, Kelsall, and Weber, and their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with any of them, who receive actual notice of

this Final Judgment, by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from, directly or indirectly, in the offer or sale of any securities, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails:

A. employing any device, scheme or artifice to defraud;

B. obtaining money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

C. engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser;

in violation of Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77q(a).

II.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants CTI, Moore, Cunningham, Kelsall, and Weber, and their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with any of them, who receive actual notice of this Final Judgment, by personal service or otherwise, and each of them, be and hereby are permanently restrained and enjoined from, directly or indirectly, in connection with the purchase or sale of any securities, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

A. employing any device, scheme or artifice to defraud;

B. making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

C. engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person;

in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

**III.**

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant CTI is liable for disgorgement of $32,844,444.24 representing profits received by Defendant CTI as a result of defendants' fraud, plus prejudgment interest thereon in the amount of $8,602,149.45 due as of February 20, 2004, and accruing at a daily rate of $5,224.34 until entry of this Final Judgment. Defendant CTI shall satisfy this obligation within thirty (30) days to the Clerk of this Court, together with a cover letter identifying the defendant(s) making the payment; setting forth the title and civil action number of this action and the name of this Court; and specifying that the payment is made pursuant to this Final Judgment. Defendant CTI shall simultaneously transmit photocopies of such payment and letter to the Commission's counsel in this action.

## IV.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Moore is liable for disgorgement of $4,361,993.00, representing profits he received as a result of defendants' fraud, plus prejudgment interest thereon in the amount of $1,142,431.13, due as of February 20, 2004, and accruing at a daily rate of $693.83 until entry of this Final Judgment. Defendant Moore shall satisfy this obligation within thirty (30) days to the Clerk of this Court, together with a cover letter identifying Moore as the defendant making the payment; setting forth the title and civil action number of this action and the name of this Court; and specifying that the payment is made pursuant to this Final Judgment. Defendant Moore shall simultaneously transmit photocopies of such payment and letter to the Commission's counsel in this action.

## V.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Cunningham is liable for disgorgement of $4,361,993.00, representing profits he received as a result of defendants' fraud, plus prejudgment interest thereon in the amount of $1,142,431.13, due as of February 20, 2004, and accruing at a daily rate of $693.83 until entry of this Final Judgment. Defendant Cunningham shall satisfy this obligation within thirty (30) days to the Clerk of this Court, together with a cover letter identifying Cunningham as the defendant making the payment; setting forth the title and civil action number of this action and the name of this Court; and specifying that the payment is made pursuant to this Final Judgment. Defendant Cunningham shall simultaneously transmit photocopies of such payment and letter to the Commission's counsel in this action.

## VI.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Kelsall is liable for disgorgement of $147,000, representing profits he received as a result of defendants' fraud, plus prejudgment interest thereon in the amount of $38,500.15, due as of February 20, 2004, and accruing at a daily rate of $23.38 until entry of this Final Judgment. Defendant Kelsall shall satisfy this obligation within thirty (30) days to the Clerk of this Court, together with a cover letter identifying Kelsall as the defendant making the payment; setting forth the title and civil action number of this action and the name of this Court; and specifying that the payment is made pursuant to this Final Judgment. Defendant Kelsall shall simultaneously transmit photocopies of such payment and letter to the Commission's counsel in this action.

## VII.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant Weber is liable for disgorgement of $440,000, representing profits he received as a result of defendants' fraud, plus prejudgment interest thereon in the amount of $115,238.54, due as of February 20, 2004, and accruing at a daily rate of $69.99 until entry of this Final Judgment. Defendant Weber shall satisfy this obligation within thirty (30) days to the Clerk of this Court, together with a cover letter identifying Weber as the defendant making the payment; setting forth the title and civil action number of this action and the name of this Court; and specifying that the payment is made pursuant to this Final Judgment. Defendant Weber shall simultaneously transmit photocopies of such payment and letter to the Commission's counsel in this action.

## VIII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that by making any payments for disgorgement or prejudgment interest, Defendants CTI, Moore, Cunningham, Kelsall, and Weber each relinquish all legal and equitable right, title, and interest in such funds, and no part of the funds shall be returned to defendants. The Clerk shall deposit all funds paid by defendants into an interest bearing account with the Court Registry Investment System ("CRIS"). These funds, together with any interest and income earned thereon (collectively the "Fund"), shall be held by the CRIS until further order of the Court. In accordance with the guidelines set by the Director of the Administrative Office of the United States Courts, the Clerk is directed, without further order of this Court, to deduct from the income earned on the money in the Fund a fee equal to ten percent of the income earned on the Fund. Such fee shall not exceed that authorized by the Judicial Conference of the United States. The Commission may propose a plan to distribute the Fund subject to the Court's approval.

## IX.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants CTI shall pay a civil penalty in the amount of $550,000 for its violations of the federal securities laws, pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78(u)(d)(3). Defendant CTI shall make this payment within thirty (30) days after entry of this Final Judgment by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission. The payment shall be delivered or mailed to the Office of Financial Management, Securities and

Exchange Commission, Operations Center, 6432 General Green Way, Mail Stop 0-3, Alexandria, Virginia 22312, and shall be accompanied by a letter identifying CTI as the defendant making the payment; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Final Judgment. A copy of the letter and the check or money order shall be simultaneously transmitted to counsel for the Commission at its Los Angeles office located at 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036.

X.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Moore shall pay a civil penalty in the amount of $110,000 for his violations of the federal securities laws, pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78(u)(d)(3). Defendant Moore shall make this payment within thirty (30) days after entry of this Final Judgment by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission. The payment shall be delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Mail Stop 0-3, Alexandria, Virginia 22312, and shall be accompanied by a letter identifying Moore as a defendant in this action; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Final Judgment. A copy of the letter and the check or money order shall be simultaneously transmitted to counsel for the Commission at its Los Angeles office located at 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036.

## XI.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Cunningham shall pay a civil penalty in the amount of $110,000 for his violations of the federal securities laws, pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78(u)(d)(3). Defendant Cunning ham shall make this payment within thirty (30) days after entry of this Final Judgment by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission. The payment shall be delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Mail Stop 0-3, Alexandria, Virginia 22312, and shall be accompanied by a letter identifying Cunningham as a defendant in this action; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Final Judgment. A copy of the letter and the check or money order shall be simultaneously transmitted to counsel for the Commission at its Los Angeles office located at 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036.

## XII.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Kelsall shall pay a civil penalty in the amount of $110,000 for his violations of the federal securities laws, pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78(u)(d)(3). Defendant Kelsall shall make this payment within thirty (30) days after entry of this Final Judgment by certified check, bank cashier's check,

or United States postal money order payable to the Securities and Exchange Commission. The payment shall be delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Mail Stop 0-3, Alexandria, Virginia 22312, and shall be accompanied by a letter identifying Kelsall as a defendant in this action; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Final Judgment. A copy of the letter and the check or money order shall be simultaneously transmitted to counsel for the Commission at its Los Angeles office located at 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036.

**XIII.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant Weber shall pay a civil penalty in the amount of $110,000 for his violations of the federal securities laws, pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. § 78(u)(d)(3). Defendant Weber shall make this payment within thirty (30) days after entry of this Final Judgment by certified check, bank cashier's check, or United States postal money order payable to the Securities and Exchange Commission. The payment shall be delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Mail Stop 0-3, Alexandria, Virginia 22312, and shall be accompanied by a letter identifying Weber as a defendant in this action; setting forth the title and civil action number of this action and the name of this Court; and specifying that payment is made pursuant to this Final Judgment. A copy of the letter and the check or money order shall be simultaneously transmitted to counsel for the

Commission at its Los Angeles office located at 5670 Wilshire Boulevard, 11th Floor, Los Angeles, CA 90036.

**XIV.**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court shall retain jurisdiction over this action for all purposes, including to implement, enforce, and carry out the terms of this Final Judgment and all orders and decrees which have been entered or may be entered herein, and to grant such other relief as the Court may deem necessary and just.

There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk is ordered to enter this Final Judgment forthwith and without further notice.

Dated: April 28, 2004

/s/_____

The Honorable Percy Anderson
UNITED STATES DISTRICT JUDGE

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**
**WESTERN DIVISION**

**No. CV 02-05143 PA (Ctx)**

**[Filed February 2, 2004]**

| | |
|---|---|
| SECURITIES AND EXCHANGE COMMISSION, Plaintiff, | ) |
| v. | ) |
| CURRENCY TRADING INTERNATIONAL, INC., BRIAN R. MOORE, CRAIG A. CUNNINGHAM, CRAIG WIGINTON, JAMES R. KELSALL, CHRISTIAN J. WEBER and ROBERT SHANE JONES, Defendants. | ) |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following Findings of Fact and Conclusions of Law as to Defendants Currency Trading International, Inc. ("CTI"), Brian R. Moore ("Moore"),

Craig A. Cunningham ("Cunningham"), James R. Kelsall ("Kelsall") and Christian J. Weber ("Weber").[1]

## FINDINGS OF FACT

### A. Stipulated and Admitted Facts

1. CTI was incorporated in Florida in 1993 and was wholly owned by Defendants Moore and Cunningham. (*See* Complaint ¶ 6, CTI Answer ¶ 6).

2. The principal office of CTI was located in Newport Beach, CA. At times relevant between late 1994 and late 1998, CTI had offices in San Diego, California, Irvine, California, Cleveland, Ohio and Akron, Ohio. (*See* Complaint ¶ 6, CTI Answer ¶ 6).

3. CTI registered with the Commission as a broker-dealer in December, 1993 and was a foreign currency options participant on the Philadelphia Stock Exchange ("PHLX") from late 1994 through late 1998. In its business, CTI solicited clients, principally through cold calling, to purchase foreign currency options traded on the PHLX. (*See* Complaint ¶ 7, CTI Answer ¶ 7).

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[1] Defendant Kelsall failed to appear at trial. Defendant Weber appeared at the commencement of trial but absented himself after the first week of evidence. Defendants Craig Wiginton and Robert Shane Jones entered into separate consent settlements with the Plaintiff Commission. Accordingly, Judge Alicemarie H. Stotler entered Final Judgments of Permanent Injunction and Other Relief as to Defendant Wiginton on January 21, 2001 and as to Defendant Robert Shane Jones on January 22, 2001.

4. CTI closed its offices and ceased conducting business in late 1998. (*See* Complaint ¶ 8, CTI Answer ¶ 8).

5. Defendant Moore resides in Bath, Ohio. Moore owns 50% of CTI and served as CTI's President and Chief Compliance Officer. (*See* Complaint ¶ 9, CTI Answer ¶ 9).

6. At times relevant, Defendant Cunningham resided in Irvine, California. Cunningham owns 50% of CTI and served as CTI's Vice President. (*See* Complaint ¶ 10, CTI Answer ¶ 10).

7. During the period from mid-1994 through October, 1996, Defendant Cunningham directly solicited clients for CTI, trained and supervised registered representatives for CTI, and assisted in managing its operations. From October, 1996 through late 1998 Cunningham ceased direct solicitations and undertook compliance duties in addition to supervisory and management roles. (*See* Complaint ¶ 10, CTI Answer ¶ 10).

8. Defendant Wiginton worked at CTI as a registered representative from January 1995 until the fall of 1997, when he became the sales manager of CTI's Newport Beach Office. Wiginton held this position as sales manager until CTI closed in late 1998. (*See* Complaint ¶ 11, CTI Answer ¶ 11).

9. Defendant Kelsall worked as a sales manager in CTI's Akron, Ohio office from the fall of 1996 until May, 1997. From May, 1997 until January 1998, Kelsall served as Sales Manager of the Cleveland Office of CTI. (*See* Complaint ¶ 12, CTI Answer ¶ 12).

10. Defendant Weber worked as a registered representative at CTI from June, 1997 until December 1997. (*See* Complaint ¶ 13, CTI Answer ¶ 13).

11. Defendant Jones worked as a registered representative at CTI from 1996 until mid-1997. From mid-1997 until January, 1988, Jones worked as a Sales Manager at the Akron, Ohio office of CTI. (*See* Complaint ¶ 14, CTI Answer ¶ 14).

12. CTI principally solicited small business owners in Ohio, Georgia, California and Colorado. (*See* Complaint ¶ 15, CTI Answer ¶ 14).

13. Defendants Moore and Cunningham opened CTI branch offices in San Diego, Cleveland, Ohio and Akron, Ohio and hired sales managers, including Wiginton, Kelsall and Jones, for each of these offices. Defendants Moore and Cunningham together with their sales managers, including Wiginton, Kelsall and Jones, had authority to hire, fire, train and discipline CTI employees. (*See* Complaint ¶ 17, CTI Answer ¶ 17).

**B. Defendants' Fraudulent Scheme**

14. Moore and Cunningham created and at all times controlled CTI and its brokers. They hired and fired sales persons and instructed these sales persons on what to say to customers. They were both involved in the day-to-day operation of CTI. They supervised brokers and monitored their telephone solicitations. They reviewed and approved account opening documents and trade tickets. They also reviewed client math sheets on a regular basis. They reviewed, discussed and responded to all client complaints.

No money was returned to clients unless Moore or Cunningham approved such remittances.

15. During times relevant, CTI sold foreign currency options traded on the Philadelphia Stock Exchange. In almost all cases, CTI traded foreign currency options that were "out of the money" – i.e., a call option for which the exercise price is more than the market price of the underlying currency, or a put option in which the exercise price is less than the market price of the underlying currency.

16. CTI brokers were required to solicit customers with standardized and uniform sales pitches. Rolland E. Gray, a former CTI broker from the San Diego office, testified, that he was directed by the office manager to copy the sales pitch into his own handwriting from a typed script. Gray and other brokers in the San Diego office used the script when soliciting customers. Cunningham testified at trial that, at one time, all brokers had used the same sales script in San Diego. Wiginton, the office manager in CTI's Newport Beach office, confirmed this practice of requiring brokers to use prepared, uniform scripts. Robert Baker, a broker in Newport Beach, testified that when he started working for CTI in August 1997, Moore gave him a written outline of an opening sales pitch. Similarly, Brian McClusky, a broker in CTI's Akron, Ohio office, testified that in 1997, the sales manager gave him a sales script. In addition, in morning meetings, Moore stressed the necessity of uniform recommendations and sales presentations.

17. CTI brokers, at the direction of Defendants Moore and Cunningham, made deliberate oral misrepresentations on the telephone to customers and potential customers of CTI with a view toward inducing the purchase of foreign currency options.

18. CTI, with the knowledge or at the direction of Moore and Cunningham, failed to disclose to CTI customers material information concerning their accounts and options trading. Almost all of the CTI customers had never traded options before and relied entirely on the recommendation of the firm as expressed by the broker. Brokers solicited trades without a discussion of the true nature of the option, including its risk and that an option had a time limited value and could ultimately expire worthless. Numerous customers testified that written materials including brochures published by the PHLX which disclosed the nature of options trading were not sent to them until after they had agreed to open an account and make an investment. CTI also never disclosed to initial customers that they could not control their own accounts and would be subject to "net trading" at the discretion of the firm. CTI also did not disclose that the firm would refuse to execute "sell only" orders from customers and to return promptly moneys in the customers' accounts on demand.

19. CTI, with the knowledge or at the direction of Moore and Cunningham, misled investors concerning the risks of trading foreign currency options. Brokers orally downplayed the risk disclosures contained in the written documents by telling the customers that the documents were a formality or "unduly negative." In the alternative, the sales persons told the customers that although the options market was risky, CTI personnel were so experienced and so good that they would get the customer out of the market before the customer could lose money. Brokers also promised falsely to "monitor the customer's account" and to take action before the customer could lose money. And brokers repeatedly told the customers to "Trust us." Customers were told that CTI was in the business of making money for their customers and had been in that business for a substantial period of time. All of these statements were false and misleading statements.

20. CTI, with the knowledge or at the direction of Moore and Cunningham, misled investors concerning the potential profitability of trading foreign currency options. CTI brokers told prospective investors that there was a very high likelihood of making very large profits in a very short time with little risk.[2] Numerous witnesses testified that brokers told customers that they would "double or triple" their money within a week or even days.

21. CTI, with the knowledge or at the direction of Moore and Cunningham, misled investors concerning the likelihood of immediate returns from trading foreign currency options. Brokers also told their clients that they would make an immediate profit with each penny move in the underlying currency. However, this statement could be true, if at all, only for an "at the money" option, and was not true for the "out of the money" options sold by CTI. Brokers failed to disclose that such immediate profits could not be generated from the types of options that they were selling to the customers.

22. CTI, with the knowledge or at the direction of Moore and Cunningham, misrepresented to CTI customers the value of their accounts to pressure them to invest additional funds or to accelerate their trading. Once a customer invested the initial $7,500 and purchased option positions, brokers were required to contact the customer to "reload" him or to increase his investment. Brokers falsely told customers that their accounts were making money (when the accounts were actually losing money), and encouraged those customers to

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[2] Foreign currency options are extremely risky investments. Over 80% of CTI investors lost substantial amounts of money and paid very large commissions to the company.

send more money to add to other winning positions. On other occasions, brokers falsely told the customers that their accounts were losing money (when the accounts were actually making money), and encouraged them to purchase additional options to "average down" to prevent further losses or to redeem their account.

23. CTI, with the knowledge or at the direction of Moore and Cunningham, failed to disclose to CTI customers how CTI would manage their accounts. CTI and its sales persons consistently refused to execute sell orders for customers unless the customer agreed to purchase another options position and also refused or delayed in sending customer funds back to clients. The refusal to allow "sell" only orders was never disclosed to customers at the inception of their trading. CTI also did not tell customers that it would engage in "net trades" – i.e., a sale of one position and the purchase of a new position. "Net trades" generated for CTI an eight percent commission on the sale and another eight percent on the purchase, for a total of sixteen percent on the round-turn trade. Brokers also did not tell customers that the firm would engage in block trades of all customers' positions at one time. At times, these block trades would be undertaken by Moore without prior customer authorization and would clearly constitute unauthorized trades in the customers' accounts.

24. CTI, with the knowledge or at the direction of Moore and Cunningham, failed to disclose that the firm would refuse to return moneys held in the customer's account unless the customer made a formal written demand and threatened litigation. It was undisputed that a customer was entitled to have his position sold and his money returned on the customer's express request.

25. CTI, with the knowledge or at the direction of Moore and Cunningham, failed to disclose to CTI customers that CTI engaged in unauthorized trading in their accounts. Both Padlo, the CTI analyst, and Wiginton, the manager of CTI's Newport Beach office, testified that on multiple occasions Moore would sell out all the CTI customers in the overnight market and purchase new option positions for the customers' accounts. Wiginton testified in detail as to how Cunningham would then allocate the block trades into the individual customer accounts. When this occurred, Moore directed the brokers in the morning meeting to call the customers and to pressure them into ratifying and accepting the trades. Brokers often did not disclose that the trades had already been executed. The time clock would be moved to make the trade appear as if made after the customer's authorization.[3]

26. CTI, with the knowledge or at the direction of Moore and Cunningham, misled CTI customers concerning CTI's track record. Brokers continually represented to customers and potential customers that CTI customers were making money. Douglas Stone, a CTI customer from Stone Mountain, Georgia, testified that a CTI representative told him that some customers had made $200,000 to $300,000 in profits. Other customers were told that CTI was making money for its customers and had been in that business for a number of years. In truth, over 80% of CTI customers lost substantial amounts of money.

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[3] Moore, Cunningham and Hackett each confirmed that CTI engaged in unauthorized trading, at least for "straggler clients" that brokers could not reach to reconfirm trades.

27. CTI operated as an illegal boiler room. They sold speculative investments through high pressure sales tactics; they solicited new customers by phone, conveying favorable earnings projections, predictions of price rises and other optimistic prospects, without a factual basis; they left prospective and new clients with a deliberately created expectation of gain without risk; they rushed clients to make investment decisions under the guise that the investment opportunity would disappear; they initiated transactions that were not authorized by clients; they discouraged clients from selling options, or refused to sell options even when instructed to do so by clients; and they ignored client requests for a return of their funds and instead pressured clients to buy more options.

28. Some brokers were designated as "openers" who made the opening sales presentation to prospective clients who did not hang up. Other registered representatives were designated as "closers," who were responsible for taking over the telephone call if a prospective client was interested and consummated the sale of a foreign currency option to the new client. Managers often had "pigtail" or handsets which attached to a broker's telephone so that the manager could overhear both sides of a customer solicitation and, if necessary, join in the conversation and enhance the representations and promises which were then being made to the customer.

29. To ensure that CTI brokers carried out their fraudulent scheme, Moore and Cunningham maintained a high pressure atmosphere at each of CTI's office. Most of the CTI sales persons had little or no brokerage experience, knew nothing about foreign currency options and were not licensed with the SEC when hired. The newly hired registered representatives made 200 to 300 cold calls each day. Brokers who arrived at

the office even seconds late were berated, sent home for the day, and in some cases, fired. Cunningham and Moore, or their sales managers, punished brokers who did not generate high commissions – either by humiliating them publicly with insults and profanities or by taking away their clients.[4]

30. Moore, Cunningham, and Kelsall directed brokers as to what they should tell customers. They sometimes stood over registered representatives who were on the telephone and told them what to tell clients and prospective clients.

31. Weber functioned as a roving sales manager for CTI and trained other brokers. He told Tim Carter that his option investment was a "sure thing." Weber also told Paul and Michael Senko to liquidate their Smith Barney stock account to trade options, stating that they would double their money by the end of the week. Weber was described by other brokers as "wild with his pitch." Baker testified that he listened to Weber on the telephone behind him making false statements to a customer.

32. Kelsall was the office manager at the Akron, Ohio office of CTI, and later opened the Cleveland, Ohio office. He supervised Defendant Jones while at the Akron office and was the registered representative for Bonnie Rasmussen. In her complaint, Rasmussen stated that Kelsall told her to "trust him" and not to worry about the fact that she knew nothing about options. Ms. Rasmussen lost $227,776.89 and paid $64,673.14 in commissions to CTI. Despite being served with

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[4] On at least occasion, unhappy with an office's performance, Moore made its registered representatives kneel on the floor while he screamed obscenities at them.

the Complaint and filing an Answer to the Complaint, Kelsall failed to appear for trial.

33. Moore failed to institute proper training and disclosure procedures for CTI brokers.

34. CTI earned $32,844,444.24 in commissions from the fraudulent scheme. Moore and Cunningham each received $4,361,993, for a combined total of $8,723,986, in net profits from CTI. Weber received proceeds of $440,000 in commission from CTI, while Kelsall received $147,000.

## CONCLUSIONS OF LAW

### I. Each of the Defendants Violated the Antifraud Provisions of the Federal Securities Laws.

1. This Court has jurisdiction over this action pursuant to Sections 20(d)(1) and 22(a) of the Securities Act (the "Securities Act"), 15 U.S.C. §§ 77t(d)(1) & 77v(a), and Sections 21(d), 21(e), and 27 of the Exchange Act (the "Exchange Act"), 15 U.S.C. §§ 77u(d), 78u(e), and 78aa.

2. Each of the defendants directly or indirectly made use of the mails, means or instruments of transportation or communication in interstate commerce, or means or instrumentalities of interstate commerce in connection with the transactions, acts, practices and courses of business described above.

3. Defendants offered and sold "securities" under Section 2(a)(1) of the Securities Act, 15 U.S.C. § 77b(a)(1), and Section 3(a)(10) of the Exchange Act, 15 U.S.C. § 77c(a)(10). The foreign currency options traded by CTI are securities pursuant to Section 2(1) of the Securities Act of

1933 ("Securities Act"), 15 U.S.C. § 77b(1), and Section 3(a)(10) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(10).

4. Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, thereunder, prohibit fraud in connection with the purchase or sale of any security. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder make it unlawful to, among other things, (1) "employ any manipulative or deceptive device"; (2) "make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (3) "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 15 U.S.C § 78j(b); 17 C.F.R. § 240.10b-5.

5. Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), prohibits fraud in connection with the offer or sale of securities. Section 17(a) makes it unlawful to: (1) "employ any device, scheme, or artifice to defraud"; (2) "obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are were made, not misleading"; and (3) "engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a).

6. Section 17(a) of the Securities Act and Section 10b of the Exchange Act, which courts collectively refer to as the "antifraud provisions," expressly prohibit misrepresentations and omissions of material fact as well as any manipulative or deceptive devices or conduct which operates a fraud or deceit

upon investors, if related to the purchase, offer or sale of securities. *See SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1361 (9th Cir. 1993); *see also SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450 (2d Cir. 1996); *SEC v. Poirier*, 140 F. Supp. 2d 1033 (D. Ar. 2001). The purposed of these provisions is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor," *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186, 84 S. Ct. 275, 280, 11 L. Ed. 2d 237 (1963), and thus to ensure that investors obtain disclosure of material facts in connection with their investment decisions. *SEC v. Hasho*, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992) (citing *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151, 92 S. Ct. 1456, 1471, 31 L. Ed. 2d 741 (1972)).

7. To establish liability under the antifraud provisions, the SEC must establish by a preponderance of the evidence: (1) a misrepresentation, omission, or other fraudulent device; (2) with the requisite mental state; and (3) in connection with the offer, purchase or sale of a security. *See SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1361 (9th Cir. 1993); *SEC v. Poirier*, 140 F. Supp. 2d 1033 (D. Ar. 2001); *Hasho*, 784 F. Supp. at 1106. Neither injury nor actual or justifiable reliance are elements of an SEC claim. *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363-64 (9th Cir. 1993); *SEC v. Rind*, 991 F.2d 1486, 1490 (9th Cir. 1993).

8. Materiality must be established only in the case of a misrepresentation or omission. *Hasho*, 784 F. Supp. at 1106. A fact is material if there is a substantial likelihood that a reasonable investor would consider the information important in making an investment decision. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 108 S. Ct. 978, 983, 99 L. Ed. 2d 194 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438,449, 96 S. Ct. 2126, 2132, 48 L. Ed. 2d 757 (1976).

9. A statement concerning a projection, belief, or opinion is a "factual" misstatement if: (1) the statement is not actually believed; (2) there is no reasonable basis for the statement; or (3) the speaker is aware of undisclosed facts tending to seriously undermine the statement's accuracy. *Kaplan v. Rose*, 49 F.3d 1363, 1375 (9th Cir. 1994), *cert. denied*, *Payne v. Kaplan*, 516 U.S. 810 (1995).

10. The Ninth Circuit specifically has stated that "'[s]ome statements, although literally accurate, can become, through their context and manner of presentation, devices which mislead investors.'" *In re Convergent Technologies Sec. Lit.*, 948 F.2d 507, 512 (9th Cir. 1991) (citations omitted). Thus, "the disclosure required by the federal securities laws is measured not by literal truth, but by the ability of material to accurately inform rather than mislead [investors]." *Id.*, *SEC v. C.R. Richmond & Co.*, 565 F.2d 1101, 1106-07 (9th Cir. 1977) (finding advertisements "deceptive and misleading in their overall effect even though when narrowly and literally read, no single statement of material fact was false").

11. Violations of Section 17(a)(1), Section 10(b), and Rule 10b-5 require a showing of scienter, while violations of Section 17(a)(2) and (a)(3) only require negligence. *SEC v. GLT Dain Rauscher, Inc.*, 254 F.3d 852, 856 (9th Cir. 2001). Scienter is defined as a "mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12, 96 S.Ct. 1375, 1381 n.12, 47 L. Ed. 2d 668 (1976). The scienter requirement is satisfied by knowing and intentional conduct. *SEC v. Goldfield Deep Mines Co. of Nevada*, 758 F.2d 459, 466 (9th Cir. 1985) (citing *Aaron v. SEC*, 446 U.S. 680, 690, 100 S.Ct. 1945, 1952, 64 L. Ed. 2d 611 (1980)). Scienter also may be established by a showing of reckless conduct. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69

(9th Cir. 1990) (en banc), *cert. denied*, 449 U.S. 976 (1991). Proof of recklessness can be inferred from circumstantial evidence. *SEC v. Burns*, 816 F.2d 471,474 (9th Cir. 1987).

12. In the Ninth Circuit, "an actor is reckless if he 'had reasonable grounds to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts although [the actor] could have done so without extraordinary effort.'" *Id.* (quotations omitted); *see also Burgess v. Premier Corp.*, 727 F.2d 826, 932 (9th Cir. 1994) (same).

13. To meet the negligence standard under the federal securities laws, a securities professional must comply with the "expansive and controlling standard of reasonable prudence, as to both investigative and disclosure obligations." *Dain Rauscher*, 254 F.3d at 859; *accord SEC v. Hughes Capital Corp.*, 124 F.3d 449, 453-54 (3d Cir. 1997) (defining negligence in securities context as the failure to exercise reasonable care and competence).

14. To be entitled to relief in this case, the Commission need only prove that each defendant made one oral or written statement that was materially misleading. *See In re Apple Computers Sec. Lit.*, 886 F.2d 1109, 1118 (9th Cir. 1989), *cert. denied*, 496 U.S. 943, 110 S.Ct. 3229, 110 L. Ed. 2d 676 (1990).

15. In this case, defendants had an affirmative duty to disclose accurate and complete information, not only because they held themselves out as securities professionals, but, equally important, because they made recommendations to prospective and existing clients. *See Dain Rauscher*, 254 F.3d 852, 857-58 (9th Cir. 2001) ("a securities professional . . . . ha[s] a duty to make an investigation that would provide him

with a reasonable basis for a belief that the key representations in the statements provided to the investors were truthful and complete").

16. As the Ninth Circuit has repeatedly made clear, the federal securities laws "'impose[] a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading.'" *SEC v. Fehn*, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996) (citations omitted) (emphasis added); *see also Ackerman v. Schwartz*, 947 F.2d 841, 846 (7th Cir. 1991) ("Federal [securities] law requires persons to tell the truth about material facts once they commence speaking"); *U.S. v. Cannistraro*, 800 F. Supp. 30, 81 (D.N.J. 1992) ("it is a well-settled principle that once disclosures are made, there is a duty to disclose all material information regardless of a fiduciary duty owed to the shareholders. . . . Once a defendant chooses to speak, he or she is not free to lie or mislead.")

17. As securities professionals, defendants owed their clients a fiduciary duty of fair dealing and full disclosure when recommending securities. *See SEC v. Zandford*, 535 U.S. 813, 823, 122 S. Ct. 1899, 1905, 153 L. Ed. 2d 1 (2002) ("any distinction between omissions and misrepresentations is illusory in the context of a broker who has a fiduciary duty to his clients"); *Dain Rauscher*, 254 F.3d at 856, 857-58 (brokers and dealers required to "deal fairly with others and not engage in deceptive, dishonest, unfair practices"). Defendants were required to disclose all material information that was necessary to make their statements to CTI clients not misleading. *Vucinich v. Paine, Webber, Jackson & Curtus, Inc.*, 803 F.2d 454, 456 (9th Cir. 1986).

18. Defendants had an affirmative duty to disclose, but failed to disclose, to prospective and new clients, among other material facts: that CTI purchased out-of-the money options; that an immediate profit could only be made if CTI purchased at-the-money or in-the-money options; that most of CTI clients lost money; that CTI pursued a practice of net-trading; that CTI engaged in unauthorized trading when brokers could not get a hold of clients or if management decided to trade on behalf of all clients at once; and that clients had a difficult time taking their money out of CTI.

19. In view of defendants' claimed expert knowledge, defendants also were under a duty not to take advantage of their customers' trust and confidence or ignorance of market conditions. *Charles Hughes & Co. v. SEC*, 139 F.3d 434, 437 (2d Cir. 1943); *Hasho*, 784 F. Supp. at 1107-08. Defendants also had a duty to explain the nature of and risks associated with foreign currency options trading in a way that a client understood. *Vucinich*, 803 F.2d at 456. The evidence in this case establishes that defendants and CTI's broker not only failed to disclose to prospective and new clients the material facts discussed in paragraph 23 through 25 above, but also breached their clients' trust and confidence and took advantage of clients' ignorance of market conditions.

20. Each of the defendants had an affirmative duty to perform an investigation that would provide them with a reasonable basis that their representations to CTI's clients were accurate and complete. *Dain Rauscher*, 254 F.3d at 857-58 ("securities professional has an obligation to investigate the securities he or she offers to customers . . . [and] to provide . . . a reasonable basis for a belief that the key representations in the statements provided to investors were truthful and complete"). By their recommendations, defendants implied that a reasonable investigation was made,

that their recommendations were based on this investigation, and that the recommendations were in the best interests of their clients. *See Hanley v. SEC*, 415 F.2d 589, 595-96 (2d Cir. 1969).

21. Defendants did not have a reasonable basis for, at least, their representations concerning CTI's track record and profit predictions. Not only did defendants know that the majority of CTI clients lost money when they closed their accounts, but, equally important, defendants failed to provide complete and accurate information to their clients as stated in paragraph 23 through 25.

22. Defendants also had a duty to supervise their representatives and salespersons to prevent violations of the federal securities laws. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1573-74 (9th Cir. 1990) (en banc) ("securities laws . . . impose a duty on broker-dealer to supervise their registered representatives"). Defendants failed to properly supervise. Indeed, Moore and Cunningham held up as examples, and promoted to sales managers, brokers who engaged in aggressive, high pressure, and fraudulent sales tactics.

23. Because defendants exercised control and, at times, discretion over CTI client accounts through unauthorized and preconfirmed trading, defendants had a duty to monitor their clients' investments. Poser, Broker-Dealer Law And Regulation § 2.03[E] (3d ed. 2002 Supp.). Defendants breached this duty in failing to timely inform clients when their options were losing value or about to expire.

24. Defendants also had a duty to buy and sell securities only after a customer approved the transaction and to inform their clients that if unauthorized trading had occurred, clients

had a right to reject the unauthorized trades. Poser, Broker-Dealer Law And Regulation § 3.04 (3d ed. 2002 Supp.). Defendants, however, failed to inform their clients that CTI had a practice of unauthorized trading or that in particular instances trades had already been executed in the market. In those instances when unauthorized trading was not disclosed, clients were left with the false and misleading impression that they were approving trades that had not yet been executed in the market.

25. Defendants also had a duty not to recommend a security or investment program that is unsuitable for a customer in light of his financial situation, needs, or investment objectives. Poser, Broker-Dealer Law And Regulation § 3.03[B] (3d ed. 2002 Supp.). Defendants breached this duty by recommending continued trading to clients who had exhausted their liquid net worth and suffered substantial losses in the market. In some cases, defendants required clients to falsify their net worth as a condition of continued trading through CTI.

26. CTI had many of the elements or attributes of an illegal "boiler room": they sold speculative investments through high pressure sales tactics; they solicited new customers by phone, conveying favorable earnings projections, predictions of price rises and other optimistic prospects, without a factual basis; they left prospective and new clients with a deliberately created expectation of gain without risk; they rushed clients to make investment decisions under the guise that the investment opportunity would disappear; they initiated transactions that were not authorized by clients; they discouraged clients from selling options, or refused to sell options even when instructed to do so by clients; and they ignored client requests for a return of their funds and instead pressured clients to buy more options. *See*

*Hanley v. SEC*, 415 F.2d 589, 596 n.14 (2d Cir. 1969); *Hasho*, 784 F. Supp. at 1107-08.

27. By engaging in the conduct described above, each of the defendants, directly or indirectly, in connection with the purchase or sale of securities, by the use of means or instrumentalities of interstate commerce, or of the mails, with scienter,

(1) employed devices, schemes or artifices to defraud;

(2) made untrue statements of material fact or failed to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and

(3) engaged in acts, practices or courses of business which operated or would operate as fraud or deceit upon other persons, in violation of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

28. By engaging in the conduct described above, each of the defendants, directly or indirectly, in the offer or sale of securities, by the use of means or instruments of transportation or communication in interstate commerce or by use of the mails,

(1) with scienter, employed devices, schemes or artifices to defraud;

(2) obtained money or property by means of untrue statements of material fact or by omitting to state material facts necessary in order to make the

statements made, in light of the circumstances under which they were made, not misleading; and

(3) engaged in transactions, practices or courses of business which operated or would operate as a fraud or deceit upon the purchasers of such securities in violation of Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

29. CTI, as a corporation, was responsible for the acts of its employees, agents directors, and officers performed within the scope of its authority, even though such conduct may be contrary to the corporation's actual instructions or contrary to the corporation's stated policies. *U.S. v. Beusch*, 596 F.2d 871, 877-78 n.7 (9th Cir. 1979); *see also* Manual of Model Civil Jury Instructions for the Ninth Circuit §§ 6.1, 6.2 (2001 ed.).

30. Moore and Cunningham, as principals and supervisors, are also liable for all violations of CTI's employees under an agency theory. *See Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1576-78 (9th Cir. 1990) (en banc) (reaffirming that agency principles, including respondent superior theory, may be used to establish vicarious liability in securities cases and that under agency theory there is no good faith defense for principal; Manual of Model Civil Jury Instructions for the Ninth Circuit, §§ 6.4, 6.5, 6.6, 6.7, 6.9, 6.10, 21.7 (2001 ed.). At all times relevant in this case, CTI's managers and brokers were acting within the scope of authority in soliciting clients and managing client accounts. The purported good faith of Moore and Cunningham is not a defense to respondent superior liability. *Id.*; *c.f. Sunset Bay Associates v. Eureka Federal Savings and Loan Ass'n*, 944 F.2d 1503, 1519 (9th Cir. 1991) ("[u]nder circumstances where an employee's superior has instructed the employee to

act in furtherance of fraudulent scheme, statements made by the employee relating to that scheme are admissible against the superior under Fed. R. Evid. 801(d)(2)(D)"); *Michaels v. Michaels*, 767 F.2d 1185, 1201 (7th Cir. 1985) (in securities fraud action, statements by broker who had been authorized to contact buyers for defendant company were authorized admissions under Fed. R. Evid. 801(d)(2)(C)).

31. Moore is also liable as a control person for CTI's Section 10(b) and Rule 10b-5 violations. *See Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1065-66 (9th Cir. 2000) (discussing control person liability standards). The SEC has established by a preponderance of the evidence that Moore possessed, directly or indirectly, the power to direct or cause the direction of the management and policies at CTI. *See id.* Moore has not established the affirmative defense of good faith for control person liability, because Moore has not established that he acted in good faith or that he did not directly or indirectly induce CTI's Section 10(b) or Rule 10b-5 violations. *See id.*

32. The individual broker defendants (Weber and Kelsall) cannot avoid their duties by relying on their employer. *Hash*, 784 F. Supp. at 1107. A registered representative is not shielded from liability if he actually believed the representations which he did not have adequate basis to make. *See id.* (citations omitted).

33. The Commission has demonstrated a reasonable likelihood that, unless enjoined, each of the defendants will continue to engage in transactions, acts, practices and courses of business similar to those described above, in violation of Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. Entry of a

permanent injunction against each of the defendants prohibiting further such violations is therefore appropriate. *See SEC v. Murphy*, 626 F.2d at 655.

34. Defendants' violations of the federal securities laws involved fraud, deceit and manipulation, and directly or indirectly resulted in substantial losses to other persons. The Court therefore orders each of the defendants to pay a third tier civil money penalty, pursuant to Section 20(d)(2)(C) of the Securities Act, 15 U.S.C. § 77t(d)(2)(C), and Section 21(d)(3)(B)(iii) of the Exchange Act, 15 U.S.C. § 78u(d)(3)(B)(iii).

35. The Court further orders disgorgement of all ill-gotten received by each of the defendants. *See SEC v. First Pacific Bancorp*, 142 F.3d 1186, 1191 (9th Cir. 1998) (disgorgement is designed to deprive a wrongdoer of unjust enrichment and to deter others from violating the securities laws my making violations unprofitable).

36. Additionally, the Defendants are ordered to pay prejudgment interest on the amounts disgorged as ill-gotten gains calculated pursuant to 28 U.S.C. § 1961. *See SEC v. Cross Financial Services, Inc.*, 908 F. Supp. 718, 734 (C.D. Cal. 1995) (amount of disgorgement should include all gains, including prejudgment interest, flowing from the illegal activity); *Western Pacific Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1994).

37. On or before February 13, 2004, Plaintiff is to file and serve a proposed Judgment to conform to the Court's findings and conclusions. Objections to the form of Judgment, if any, are to be lodged with the court on or before February 20, 2003.

IT IS SO ORDERED.

DATED: January 29, 2004

/s/_____
Percy Anderson
United States District Judge

## APPENDIX D

## RELEVANT STATUTORY PROVISIONS INVOLVED

### 18 U.S.C. § 1345

**§ 1345. Injunctions against fraud**

(a) (1) If a person is--

(A) violating or about to violate this chapter [18 U.S.C. §§ 1341 et seq.] or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title [18 U.S.C. § 287, 371, or 1001];

(B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title [18 U.S.C. § 3322(d)]); or

(C) committing or about to commit a Federal health care offense;

the Attorney General may commence a civil action in any Federal court to enjoin such violation.

(2) If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322(d) of this title [18 U.S.C. § 3322(d)]) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court--

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to--

(i) prohibit any person from withdrawing, transferring,

removing, dissipating, or disposing of any such property or property of equivalent value; and

(ii) appoint a temporary receiver to administer such restraining order.

(3) A permanent or temporary injunction or restraining order shall be granted without bond.

(b) The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

## 28 U.S.C. § 516

### § 516. Conduct of litigation reserved to Department of Justice

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

## 28 U.S.C. § 519

**§ 519. Supervision of litigation**

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title [28 U.S.C. § 543] in the discharge of their respective duties.

## 28 U.S.C. § 547(2)

**§ 547. Duties**

Except as otherwise provided by law, each United States attorney, within his district, shall--

...(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;